

In its Order dated November 30, 2005, the Board increased claimant's work disability (a permanent partial general disability greater than the functional impairment rating) from 46.5 percent to 63 percent.

The principal issue in this claim was claimant's post-injury wage for purposes of the K.S.A. 44-510e permanent partial general disability formula. The Board found that claimant failed to make a good faith effort to retain his employment with respondent. Respondent alleged it was *potentially able to accommodate* claimant's permanent work restrictions had claimant completed a drug rehabilitation program. As respondent's loss control director testified he had no knowledge whether respondent modified a worker's wages after returning to work under similar circumstances, the Board found the evidence failed to establish that respondent could have accommodated claimant's work restrictions and what such accommodated employment would have paid. Consequently, the Board determined claimant's post-injury wage based upon his retained ability.

In its July 21, 2006, decision, the Court of Appeals found the Board erred. The Court ruled in cases where the worker has failed to make a good faith effort to retain his or her employment, the mere *potential* for accommodation at the same wage precludes an award of work disability. The Court reasoned that it would be *unduly onerous* to require an employer to prove what wages it would have paid in an accommodated job. Consequently, the Court remanded this proceeding with directions to award claimant permanent disability benefits based upon his functional impairment.

The only issue on this remand is the extent of claimant's whole person functional impairment as measured by the fourth edition of the *AMA Guides*.<sup>1</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the parties' arguments, the Board finds and concludes:

As indicated in the Board's November 30, 2005, Order, the record contains two functional impairment opinions. Dr. Ira H. Fishman, who was the last doctor to treat claimant, determined claimant sustained a five percent whole person functional impairment as measured by the fourth edition of the *AMA Guides*. Paragraph 3 of the Findings of Fact in the Board's Order stated:

Dr. Fishman, who is a physical medicine and rehabilitation specialist, diagnosed claimant as having a lumbar strain and sent claimant to physical therapy. Dr. Fishman also had claimant undergo two functional capacity evaluations. But the first evaluation was deemed invalid due to claimant's symptom magnification and the second was also deemed invalid as the evaluators felt claimant did not put forth

---

<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

his full effort as indicated by inconsistencies between claimant's pain behavior and objective parameters. The doctor could not determine the etiology of claimant's right leg radicular pain complaints. But the doctor did believe claimant had some disc pathology in his back as an MRI scan indicated claimant had an annular tear in the lumbar disc at the L5-S1 intervertebral space and other disc degeneration at both the L4-5 and L5-S1 intervertebral levels. Dr. Fishman concluded claimant sustained a five percent whole person functional impairment as measured by the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (AMA Guides) (4th ed.). The doctor was not asked to review claimant's former work tasks and provide an opinion regarding claimant's task loss. But the doctor did testify that claimant would not be able to return to work as a laborer building roads and bridges.<sup>2</sup>

Conversely, claimant's medical expert, Dr. Edward J. Prostic, concluded claimant sustained a 10 percent whole person functional impairment. Paragraph 4 of the Findings of Fact in the Board's Order stated:

The record also contains the expert medical opinions of orthopedic surgeon Dr. Edward J. Prostic. Claimant's attorney hired Dr. Prostic to examine and evaluate claimant for purposes of this claim. The doctor examined claimant in September 2004 and concluded claimant had two-level disc disease with a superimposed lumbar sprain and strain. Dr. Prostic rated claimant as having a 10 percent whole person functional impairment, which the doctor testified was a compromise between the AMA Guides' Range of Motion model and DRE (Diagnosis-Related Estimates) model. The doctor testified, in part:

This is a compromise between the Range of Motion model and the DRE. Under the Range of Motion model he would have been close to 20 percent and the DRE Lumbosacral II would have been 5 percent. So I compromised at 10 percent.

. . . .

Well, Page 99 of the Guides indicates what to do if you're not sure which DRE to use and they tell you then to go to the Range of Motion model and pick the DRE that's closest to that. But the DRE that's closest to that is clearly not something for disc disease that is relatively stable without spinal cord injury, so I don't find that it's reasonable to go that high so I stopped at 10 percent. [Footnote citing Prostic Depo. at 18-19.]

---

<sup>2</sup> *Mahan v. Clarkson Construction Company*, No. 1,013,441, 2005 WL 3407994 (Kan. WCAB Nov. 30, 2005), *reversed and remanded with directions*, 36 Kan. App. 2d 317, 138 P.3d 790, *rev. denied* \_\_\_\_ Kan. \_\_\_\_ (2006).

Dr. Prostic agreed with the medical restrictions placed upon claimant by Dr. Fishman. Using those restrictions, Dr. Prostic determined claimant had lost the ability to perform 12 of the 14 work tasks that he had performed in the 15-year period before the October 2003 accident.<sup>3</sup>

But it is not clear from the record what edition of the *AMA Guides* Dr. Prostic utilized in evaluating claimant's impairment. Consequently, as K.S.A. 44-510e specifically requires physical impairment to be measured by the fourth edition of the *AMA Guides*, we are left with Dr. Fishman's rating. Therefore, the Board concludes claimant's permanent partial general disability is five percent.

### **AWARD**

**WHEREFORE**, the Board modifies the June 28, 2005, Award and its November 30, 2005, Order and decreases the permanent partial general disability from 46.5 percent to five percent.

Ronald E. Mahan is granted compensation from Clarkson Construction Company and its insurance carrier for an October 1, 2003, accident and resulting disability. Based upon an average weekly wage of \$1,160.91, Mr. Mahan is entitled to receive 31 weeks of temporary total disability benefits at \$440 per week, or \$13,640, plus 19.95 weeks of permanent partial general disability benefits at \$440 per week, or \$8,778, for a five percent permanent partial general disability and a total award of \$22,418, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in its November 30, 2005, Order that are not inconsistent with the above.

**IT IS SO ORDERED.**

---

<sup>3</sup> *Id.*

Dated this \_\_\_\_ day of February, 2007.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c:     Robert W. Harris, Attorney for Claimant  
       Andrew S. Mendelson, Attorney for Respondent and its Insurance Carrier  
       Robert H. Foerschler, Administrative Law Judge